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No. 89-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MENDEL E. OFMAN,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
THE HONORABLE JOHN O. MARSH,
SECRETARY OF THE ARMY, and the
ARMY BOARD FOR CORRECTION OF MILITARY RECORDS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Date: August 4, 1989

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QUESTION PRESENTED

Whether Petitioner was denied due process of law under the Fifth Amendment of the Constitution where, after unjust punitive action taken against him was set aside, Petitioner (1) was denied the right to reenter the United States Army at his former rank; (2) was denied constructive credit for the time he lost; and (3) was denied back pay from the time he was unjustly separated.

LIST OF PARTIES

Plaintiff-Petitioner is Mendel E. Ofman

Defendants-Respondents are (1) the United States of America; (2) The Honorable John O. Marsh, Secretary of the Army, and (3) the Army Board for Correction of Military Records.

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ARMY BOARD FOR CORRECTION OF MILITARY RECORDS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Mendel E. Ofman petitions for a writ of certiorari to review an opinion and judgment of the United States Court of Appeals for the Second Circuit entered on March 27, 1989. The United States Court of Appeals for the Second Circuit affirmed the opinion and judgment of the United States District Court for the Eastern District of New York which (1) granted Respondents' motion for summary judgment and (2) dismissed Petitioner's complaint for reinstatement to active duty status in the United States Army as of 1980.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit denying Petitioner's request for a Rehearing In Banc is unreported. It appears in the Appendix at 1a. The decision of the United States Court of Appeals for the Second Circuit denying Petitioner's appeal is also unreported. It appears in the Appendix at 3a. The order of the United States District Court for the Eastern District of New York is unreported. It appears in the Appendix at 6a. The decision of the Army Board for the Correction of Military Records is unreported. It appears in the Appendix at 13a. The Record of Proceedings under Article 15, UCMJ (June 19, 1979) has been lodged with the Clerk of the Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 27, 1989. On June 23, 1989, Justice Thurgood Marshall granted Petitioner an Extension of Time until July 25, 1989 in which to file a Petition for a Writ of Certiorari. On July 18, 1989, Justice Thurgood Marshall granted Petitioner a Second Extension of Time until August 4, 1989 in which to file a Petition for a Writ of Certiorari. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1982).

STATUTES INVOLVED

10 U.S.C. § 815 (1982) Commanding Officer's Non-judicial Punishment

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers

exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. . . .

ARMY REGULATION No. 601-280, ch. 1, § VII, para. 2-22*a* at 2-7 (Change 5, 15 September 1981)

2-22. **Waivable disqualification.** *a.* Applicants for Regular Army reenlistment, to whom the following disqualifications apply, may be granted waivers to permit immediate reenlistment or extension. Only those disqualifications occurring during current term of service and disqualifications not previously revealed, regardless of date of occurrence, are considered applicable. Requests for waivers should be submitted sufficiently in advance of separation date to permit continuous service.

ARMY REGULATION No. 601-280, ch. 1, § VII, para. 2-23*a* at 2-7 to 2-8 (Change 5, 15 September 1981) (emphasis added)

2-23. **Persons ineligible for immediate reenlistment.** *a. Applicants to whom the disqualification(s) listed below apply are ineligible for immediate reenlistment and requests for waivers will not be submitted.* They are also ineligible for promotion unless exception is authorized in accordance with paragraph 2-23*b*. . . .

(1) *Persons being separated from current term of service whose DD Forms 214 are coded RE 1A*, RE 1B, RE 2, RE 3, RE 3A, RE 3B, RE 3C, or RE 4A . . .

(2) Persons being separated from current term of service with a bar to reenlistment in effect under provisions of this regulation.

(3) Personnel diagnosed as obese or overweight by a physician under the provisions of AR 600-9.

. . . .

ARMY REGULATION NO. 601-210, ch. 3, § III, para. 3-8, at 21 (Update 11 September 1987)

Table 3-6: Armed Forces RE codes, RA RE codes

. . . .

Code: RE-1A

Applies to: Careerists with over 6 years of service for pay (over 4 years service for pay if separated on or after 15 August 1978).

Eligible:

1. Fully qualified, but ineligible to enlist within 93 days after date of separation.

2. Fully qualified for enlistment in USAR.

STATEMENT OF THE CASE

A. Army Career

On September 6, 1966, Petitioner, Mendel E. Ofman, was drafted into the United States Army. He entered the United States Army as a Private E-1 and served on active duty for approximately 2½ years. On April 5, 1969, Petitioner was honorably discharged as a Specialist Four (E-4). On July 3, 1969, Petitioner reenlisted in the United States Army for a period of four years as a Specialist Four (E-4). On November 4, 1973, Petitioner received an honorable discharge and, without a break in service, he reenlisted on November 5, 1976 for a period of three years.

B. Article 15 Punishment

In October 1978, Petitioner was an E-6 supply sergeant. At the time he was serving in Korea with the 121st Evacuation Hospital located at Yongsan Military Reservation. On June 19, 1979, Petitioner received non-

judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ) from his commander for engaging in black market activities.[1]

Originally Petitioner was charged with four counts of using the Army postal system to conduct black market activities in violation of Army Regulations. Three of the counts, however, were dismissed for lack of evidence. On June 19, 1979, Petitioner waived his right to be tried by a court-martial on the remaining count and agreed to appear before his commanding officer in an Article 15 proceeding. 10 U.S.C. § 518 (1982).

At the Article 15 hearing, Petitioner argued that he was not guilty of the following charge:

> In that you did, at Yongsan Military Reservation, Korea, an installation under United States military control, during February 1979, violate a lawful general regulation which it was your duty to obey, to wit: Paragraph 17a(5) Eighth Army Regulation 27-5, dated 6 May 1975 by wrongfully soliciting Private First Class Kevin L. Spencer to use his name as the addressee on mail matter transmitted through the military postal system with the intent that such mail be returned to you the said Staff Sergeant Ofman after receipt by Private First Class Spencer.

Record of Proceedings under Article 15, UCMJ (DA Form 2627) at 1, a copy of which has been lodged with the Clerk of Court. Petitioner was charged with having

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[1] 10 U.S.C. § 815 (1982). The UCMJ not only provides for the trial of criminal offenses by general, special, and summary courts-martial, but also it provides for the imposition of nonjudicial punishment by commanding officers under Article 15 of the UCMJ. In fiscal year 1979, when the Army's average active duty strength was 758,748, there were 146,411 Article 15s imposed by commanders on soldiers serving in the United States Army. FY 1979 ANN. REP. OF THE UNITED STATES COURT OF MILITARY APPEALS AND JUDGE ADVOCATE GENERALS OF THE ARMED FORCES AND GEN'L. COUNSEL OF THE DEP'T OF TRANSPORTATION 22 (1980).

a television set sent through the Army postal system to Private First Class Spencer. When Private First Class Spencer received the television set, Petitioner was alleged to have obtained it from him and sold it to Koreans on the local market for a profit in violation of Army Regulations.

At the Article 15 hearing, the only witness for the Government recanted his previous statement to the authorities concerning Petitioner's involvement in the procurement and sale of the television, and in fact testified that Petitioner was in no way involved in the activity.

After considering the evidence, Petitioner's Commander found Petitioner guilty of the offense charged and reduced him to the grade of Specialist 5 (E-5) and required him to forfeit $150.00 per month for one month.

C. Appeal of Article 15 Punishment

Petitioner appealed the findings and punishment he received from his Commander under Article 15. He appealed the findings and punishment he received on the grounds that the only evidence against him was the testimony of one witness who recanted his testimony and exonerated Petitioner from any wrongdoing. Attached to his appeal was a sworn statement from the witness who testified that Petitioner was innocent of the charge against him.[2]

Petitioner's appeal of the Article 15 was denied. In addition to his appeal, Petitioner filed an EEO Complaint which the Army found not substantiated by the evidence. Petitioner also filed an Article 138 complaint which the Army ruled was an improper method for challenging findings and punishment imposed under Article 15, UCMJ. 10 U.S.C. § 938 (1982).

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[2] On January 8, 1986, seven years later, the Army Board for Correction of Military Records ruled that the Article 15 was unjust and unlawful and ordered that the Article 15 be removed from Petitioner's military records. *See* Appendix at 13a.

D. Waiver of Disqualification

Petitioner's term of enlistment in the United States Army was scheduled to expire on November 4, 1979, approximately five months after he received his Article 15. Before his enlistment expired, Petitioner requested a "waiver" so that he could reenlist. He needed a waiver because Paragraph 2-25 of Army Regulation 601-280 (1 July 1977) provided that soldiers in the pay grade E-5 with thirteen years of service are disqualified from reenlisting unless they obtain a waiver of the disqualification from their commanders. With 13 years of active duty in the United States Army, Petitioner had to be an E-6 before he could reenlist in the United States Army. Since he was an E-5 because of his Article 15 punishment—a grade below what he needed to reenlist—he could not reenlist unless he obtained a waiver of the E-5 disqualification from his Commander.

Petitioner's Commander, the same Commander who imposed the Article 15 punishment on Petitioner, failed to either approve or disapprove Petitioner's request for a waiver of the disqualification to his reenlistment. When the reenlistment sergeant inquired about the status of Petitioner's request for a waiver, he was told by Captain Coleman, the Commander's Executive Officer, that no action would be taken on it. Captain Coleman said that "we are going to sit on [Petitioner's request for a waiver] until [Petitioner] PCS'ed," that is, until Petitioner was transferred back to the United States to be discharged. Upon learning this, [the reenlistment sergeant] made no future attempt to get [Petitioner's request for a waiver] signed." *See* Appendix at 18a.

Petitioner was held in Korea beyond the date his term of enlistment expired, November 4, 1979, because of a continuing investigation by criminal investigators into Petitioner's connection with black market activities. The investigation cleared Petitioner of any involvement in

black market activities and on February 29, 1980, Petitioner was ordered to report to Oakland Army Base to be discharged from the Army.

E. Oakland Phase

When Petitioner arrived at Oakland Army Base, in Oakland, California, he advised those in charge of his attempt in Korea to obtain a waiver in order to be able to reenlist. After some discussion, Petitioner was given an opportunity to extend for 90 days in order to request a waiver of his grade disqualification from the commander of the Oakland Army Base. He discussed the 90-day extension with an Army legal officer and was advised that the chances of the Commander of the Oakland Army Base granting Petitioner a waiver so he could reenlist were extremely unlikely because of the Article 15 Petitioner received for black marketing activities in Korea. On March 5, 1980, Petitioner was given a choice: either extend for 90 days or take an Honorable Discharge.

Because Petitioner had little chance of obtaining the waiver he needed to reenlist, he decided not to accept the 90-day extension, and instead accepted the Honorable Discharge. On March 5, 1980 Petitioner was separated from the United States Army. He received an Honorable Discharge with a reenlistment code of RE-1A. If Petitioner had received an Honorable Discharge with a reenlistment code of RE-1, he could have reenlisted immediately without a reduction in his pay grade.[3] With a reenlistment code of RE-1A, however, Petitioner *could*

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[3] ARMY REGULATION No. 601-210, ch. 3, § III, para. 3-8 at 21 (Update 11 Sept. 1987) provides as follows:

Table 3-6:

Armed Forces RE codes, RA RE codes

Code RE-1

Applies to: Persons completing an initial term of active service who were fully qualified when last separated.

Eligible: Fully qualified for enlistment.

not reenlist for at least 93 days.[4] Army Regulations provide that soldiers who reenlist *more than 93 days after discharge* are deemed to have interrupted service and must therefore take a reduction of one pay grade when they reenlist. Thus, the practical effect of Petitioner's receiving an RE-1A reenlistment code on his Honorable Discharge is that he would have had to wait at least 93 days to reenlist, and if he did so, he would have to reenlist in the pay grade of E-4.

F. Enlistment in the United States Army Reserve

In 1983, Petitioner enlisted in the United States Army Reserve. He is still in the United States Army Reserve and presently is a Sergeant First Class (E-7). Petitioner is assigned to a drill unit in Brooklyn, New York, and in addition to performing weekend drills, he performs two weeks or more of active duty each year.

G. Army Board for Correction of Military Records

In 1982, Petitioner appealed to the Army Board for Correction of Military Records (ABCMR) to have the Article 15 he received in Korea removed from his military records and to be restored to active duty.[5] The ABCMR

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[4] ARMY REGULATION No. 601-210, ch. 3, § III, para. 3-8 at 21 (Update 11 Sept. 1987) also provides as follows:

Table 3-6:

Armed Forces RE codes, RA RE codes

. . . .

Code RE-1A

Applies to: Careerist with over 6 years of service for pay (over 4 years service for pay if separated on or after 15 August 1978).

Eligible:

1. Fully qualified, but ineligible to enlist within 93 days after date of separation.

2. Fully qualified for enlistment in USAR.

[5] In 1982, Petitioner also filed a tort action in the United States District Court for the Eastern District of New York against the United States and the Secretary of the Army challenging the Arti-

denied his appeal and Petitioner requested the ABCMR to reconsider its decision. On reconsideration, the ABCMR asked the Petitioner to submit to a polygraph examination administered by a certified U.S. Army polygraph expert. Petitioner agreed to do so under certain conditions which the ABCMR would not agree to.

H. United States District Court Complaint

On October 15, 1984, Petitioner filed a complaint in the United States District Court for the Eastern District of New York seeking (1) elimination of the challenged article 15 from his military records; (2) reinstatement to active duty; and (3) back pay and promotions from the date of his discharge March 5, 1980. A hearing was held on May 17, 1985. At the hearing, the District Court directed Petitioner to exhaust his administrative remedies and to submit to the polygraph examination requested by the ABCMR. On July 25, 1985, Petitioner took the polygraph examination. The results of the polygraph examination verified that Petitioner had not been involved in illegal black marketing activities in Korea.

I. Reconsideration by the Army Board for Correction of Military Records

Upon reviewing the new evidence establishing Petitioner's innocence and considering an opinion from the Office of the Army Judge Advocate General recommending that Petitioner's military records be corrected, the ABCMR on January 8, 1986 recommended the following action:

> 1. that all of the Department of the Army records of MENDEL E. OFMAN be corrected by removing therefrom the DA Form 2627, relating to punishment imposed on 19 June 1979, and all references thereto in other documents, from his Official Military Personnel File.

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cle 15 he received and his discharge from the Army. *Ofman v. United States*, Civil Action No. CV-82-0549 (E.D.N.Y., March 20, 1982). This complaint was later dismissed without prejudice.

> 2. That the punishment, consisting of reduction to E-5 and forfeiture of $150.00, be set aside and *all rights, privileges and property to which he was deprived as a result of said punishment be restored, including reimbursement of forfeiture and restoration to grade E-6 with his original date of rank.*
>
> 3. [And t]hat, following administrative implementation of the foregoing, the records of MENDEL E. OFMAN be submitted, if appropriate, to [a] duly constituted Standby Boar[d] for promotion consideration to the grade of E7; that in the event he is so eligible, and is selected, for promotion, this case be returned to this Board for the implementation of such promotion.

See Appendix at 16a (emphasis added). On January 23, 1986, the Deputy Assistant Secretary of the Army implemented the ABCMR's recommendations.

The ABCMR concluded, however, that Petitioner was not eligible for retroactive enlistment. The ABCMR's recommendation in this regard was based on an opinion received from the Office of the Judge Advocate General of the Army which stated in part that:

> 5. *Our opinion that the applicant is not entitled as a matter of law to [restoration to active duty and correction of his records to reflect continuous active duty since his separation] is based on the applicant's voluntary termination of his military status in March, 1980.* It is not clear from the materials in the file whether the applicant, in fact, submitted a request for waiver of his disqualifier for immediate reenlistment (excessive time in service for a soldier serving in the grade of E-5) and for reenlistment while still in Korea. . . . [E]ven if the Board determined that such in fact occurred, this issue is rendered moot, in terms of whether the applicant is entitled to relief as a matter of law, by applicant's election to be discharged on March 5, 1980 after having been afforded the opportunity to request an extension suffi-

> cient to allow a request for reenlistment to be processed. . . . In other words, the demonstrated impact on the soldier of the reduction to E-5 was *not* a *per se* denial of continued service, but rather the imposition of an additional procedural step prior to a determination of whether such continued service would be permitted, a procedural step the applicant apparently has elected not to make. *On the other hand, we note that but for the applicant's reduction to E-5, it appears that he would have been eligible for immediate reenlistment in the Regular Army, without a waiver, in March, 1980. In any event, a careful balancing of the equities in this case should be made prior to a determination of whether correction of applicant's records to reflect service on active duty beyond 5 March 1980 is required to correct an injustice.*

Opinion from Office of the Judge Advocate General of the Army dated 8 November 1985 (emphasis added).[6] App. at 20a-21a. Without any indication of its having "balanc[ed] the equities," the ABCMR concluded the

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[6] The advice given by the Office of the Army Judge Advocate General to the ABCMR concerning the voluntariness of Petitioner's resignation as a result of his failure to submit a request for a waiver is erroneous. When Petitioner was discharged on March 5, 1980, he received a reenlistment code of *RE-1A*. Paragraph 2-23*a*. of Army Regulation 601-280, Change 5 (15 September 1981) is entitled "Persons ineligible for immediate reenlistment" and states that "Applicants to whom the disqualification(s) listed below apply are *ineligible for immediate reenlistment and requests for waivers will not be submitted.*" The first group of persons who are listed as ineligible for immediate reenlistment and who are not permitted to submit requests for waivers are "(1) Persons being separated from current term of service whose DD Forms 214 are coded *RE 1A*, RE 1B, RE 2, RE 3, RE 3A, RE 3B, RE 3C, or RE 4A." (emphasis added). Because Petitioner received a reenlistment code of *RE 1A*, he was not eligible for immediate reenlistment. For this reason, Petitioner's resignation was not voluntary, but was involuntary, because he was prohibited by regulation from requesting a waiver. The fact that the United States Army offered him a 90-day extension to submit a request for a waiver was meaningless under the circumstances.

"[a]applicant is not entitled to be retroactively restored to active duty, having voluntarily terminated his military status and not having applied for reenlistment with a waiver." *Id.* at 16a.

J. Further Hearing in United States District Court

Having been granted relief by the ABCMR, Petitioner amended his complaint in the United States District Court for the Eastern District of New York. In his amended complaint, Petitioner requested (1) that the Article 15 be expunged from his military records, and (2) that he be returned to active duty in the Army with back pay, promotions, and retroactive reenlistment from the date of his discharge on March 5, 1980. The District Court held that Petitioner was not entitled to any relief other than what he received from the ABCMR. The Court also found that Petitioner could have applied for reenlistment, but waived that right when he voluntarily resigned. On May 16, 1988, the Court granted Respondent's motion for summary judgment and dismissed Petitioner's complaint with prejudice.

K. Second Circuit Court of Appeals

On October 7, 1988, Petitioner appealed the decision of the District Court to the United States Circuit Court of Appeals for the Second Circuit. In his appeal to the Second Circuit, Petitioner alleged (1) that the District Court erred in refusing to reinstate Petitioner on active duty; (2) that the District Court erred in failing to reverse the decision of the ABCMR which refused to restore Petitioner to active duty and correct his records to reflect continuous active duty since his separation; and (3) that the District Court erred in suggesting that Petitioner could bring a claim in the Court of Claims for back pay and restoration to duty.

On January 6, 1989, the Second Circuit Court of Appeals affirmed the District Court's decision to grant Re-

spondent's motion for summary judgment. In a 2-page opinion, the Court of Appeals held that Petitioner had no right to reenlistment in the armed forces and that the Court had no power to order the Army to reenlist Petitioner. In addition, the Court of Appeals stated that by not taking the 90-day extension offered to him by the Army to file for a waiver of his disqualification, Petitioner waived his right to reenlist, and hence voluntarily resigned from the Army. App. at 4a-5a.

On January 20, 1989, Petitioner submitted a petition to the Second Circuit Court of Appeals for a Rehearing In Banc. On March 27, 1989, the Court of Appeals denied Petitioner's Motion for a Rehearing. App. at 1a.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Supreme Court of the United States should GRANT the petition for a writ of certiorari in the present case for three reasons: *First*, the decision of the United States Court of Appeals for the Second Circuit is in conflict with decisions of the Courts of Appeals for the Federal Circuit, the District of Columbia Circuit and the Fourth Circuit on the issue how "involuntary or coerced resignations" are to be treated on motions for summary judgment. *Second*, the decision of the United States Court of Appeals for the Second Circuit—that Petitioner waived his right to seek reenlistment and thus voluntarily resigned from the United States Army—is arbitrary, capricious, and contrary to the law prescribed by Army Regulations. And *third*, the decision of the United States Court of Appeals for the Second Circuit violates Petitioner's right to due process of law under the Fifth Amendment because it denies Petitioner a remedy for the wrong he has suffered as a result of the government's unlawful conduct.

I. CONFLICT IN THE CIRCUITS

The first reason that the Supreme Court should grant the petition for a writ of certiorari in the present case is because the decision of the United States Court of Appeals for the Second Circuit is in conflict with decisions of the Courts of Appeals for the Federal Circuit, the District of Columbia Circuit and the Fourth Circuit on the issue of how "involuntary or coerced resignations" are to be treated on motions for summary judgment.

The issue in this case is whether Petitioner was denied due process of law under the Fifth Amendment of the Constitution where, after unlawful punitive action taken against him by the Government was set aside, Plaintiff (1) was denied the right to reenter the United States Army at his former rank; (2) was denied constructive credit for the time he lost; and (3) was denied back pay for the time he was unjustly punished.

In June 1979, Petitioner was charged, convicted and punished for an offense which he was alleged to have committed in February 1979. In 1986, seven years after the incident, the government conceded that in February 1979, Petitioner had done nothing wrong, improper, or illegal and that he was wrongly charged, unjustly convicted, and unlawfully punished.

As a result of the adverse personnel action taken against him by the Army in 1979, Petitioner's 13-year military career was terminated. It took Petitioner until January 8, 1986 to have the adverse personnel matter reversed and his military personnel records corrected. Having successfully overturned the adverse personnel action, Petitioner attempted to reenter the United States Army at his former rank and to obtain constructive credit and back pay for the time he lost as a result of his unlawful separation from the United States Army. It was Petitioner's wish to complete his 20 years in the Army to qualify for military retirement.

The government agreed to refund Petitioner the $150.00 fine it imposed on him in June 1979, and agreed to pay him approximately $1,000.00 to compensate him for the difference between E-5 and E-6 pay he was entiled to receive from the time of his punishment to the date of his discharge. The government, however, refused to grant him any further relief.

In addressing the issue of whether Petitioner was entitled to reenter the United States Army on active duty at his former rank and to be awarded constructive credit and back pay from the time of discharge to the present, the Second Circuit Court of Appeals concluded that Petitioner had voluntarily resigned from the United States Army and thus had waived any claim for relief. In reaching this decision, the Second Circuit Court of Appeals accepted the District Court's finding "that [Petitioner] had waived his right [to reenlist]" and ruled that the "Army's finding [in this regard] was neither arbitrary nor capricious." App. at 5a.

In affirming the District Court's decision to grant Respondents' Motion for Summary Judgment, the Second Circuit accepted at face value Respondents' stated contention that Petitioner waived his right to reenlist and that he voluntarily resigned from the United States Army. The Second Circuit accepted Respondents' "stated reason" for Petitioner's separation from the United States Army, even though Petitioner has contested vigorously his unjust separation from the Army for ten years, and even though the government conceded that "but for the applicant's reduction to E-5, it appears that he would have been eligible for immediate reenlistment in the Regular Army, without a waiver, in March 1980." Opinion from the Office of the Judge Advocate General of the Army at 2 dated 8 Nov. 1985. *See* App. 19a. In short, in upholding the District Court's decision to grant the motion for summary judgment on the issue of voluntariness of Petitioner's resignation," the Second Cir-

cuit applied a narrow standard for review and simply accepted the "stated reason" given by the government for Petitioner's separation from the United States Army, namely, that Petitioner waived of his right to extend and voluntarily resigned.

The Courts of Appeals for the District of Columbia and other circuits have applied a much broader test in reviewing cases involving "involuntary or coerced resignations" than the test applied by the Second Circuit Court of Appeals.[7] In *Fitzgerald v. Hampton*, 467 F.2d 755 (CADC 1972), the Court of Appeals for the District of Columbia, for example, stated that:

> The separation of Fitzgerald was initiated by the Air Force. Although the Air Force *stated* the reason for separation as a reduction-in-force, we cannot ignore the fact that Fitzgerald is vigorously contesting his separation on the ground that it was not a reduction-in-force, and that he has, in fact, been *wrongfully fired.* Were we to look no further than the *stated* reason for an employee's separation, not only could an agency cavalierly discharge preference eligibles under the guise of a "reduction-in-force" but under that type of action it could also deprive them of all adverse action procedural rights to which preference eligible are entitled.

Id. at 758-59. In *Fitzgerald*, the Court of Appeals for the District of Columbia refused to simply accept the government's "stated reason" for Fitzgerald's resignation, but instead examined all of the facts surrounding his separation. *See also Schultz v. United States Navy*, 810 F.2d 1133, 1137 (Fed. Cir. 1987) (employee's resignation held involuntary after review and discussion of the facts); *Stone v. Univ. of Md. Med. Sys.*, 855 F.2d 167, 169 (CA4 1988) (employee's resignation held voluntary after review and discussion of the facts); *Paroczay*

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[7] *See e.g., Stone v. Univ. of MD. Med. Sys.*, 855 F.2d 167, 173 (CA4 1988).

v. Hodges, 297 F.2d 439, 441 (CADC 1961) (employee's resignation held involuntary after review and discussion of the facts).[8]

Had the Second Circuit Court of Appeals thoroughly reviewed the facts in the present case rather than simply relying on the government's "stated reason" for Petitioner's separation, the Court would have found the following: (1) that the ABCMR concluded that Petitioner's Article 15 conviction was unjust and unlawful; (2) that as a result of the unjust and unlawful Article 15 action, Petitioner was reduced to the rank of E-5 and fined $150.00; (3) that as an E-5 with 13 years of active duty, Petitioner was unable to reenlist without obtaining a waiver from his commanding officer; (4) that Petitioner submitted a waiver to his commanding officer which his commander deliberately refused to act on (*See* App. at 18a); (5) that Petitioner's commander held Petitioner on active duty in Korea 121 days beyond Petitioner's term of enlistment which expired on November 4, 1979; (6) that on or about February 29, 1980, Petitioner's commander ordered Petitioner to report to Oakland Army Base, Oakland, California, for discharge from the United States Army; (7) that upon arriving at Oakland Army Base, Petitioner was to receive an Honorable Discharge with an RE-1A reenlistment code; (8) that under Army Regulation No. 601-280, ch. 1, § VII, para. 2-23*a*.(1) and *a*. "[p]ersons being separated from current term of service whose DD Form 214 are coded RE 1A . . . are ineligible for immediate reenlistment and requests for waiver will not be submitted"; (9) that the Army offered Petitioner a

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[8] A voluntary act is an act proceeding from one's own choice or full consent unimpelled by another's influence. To determine whether an act is voluntary, the trier of fact must examine all relevant facts and circumstances which might cause the actor to depart from the exercise of free choice and respond to compulsion from others.

Kasumi Nakashima v. Acheson, 98 F. Supp. 11, 12 (S.D. Cal. 1951).

90-day extension to apply for a waiver that he was not entitled to apply for under the above regulation; (10) that on March 5, 1980 Petitioner was given a choice between accepting the 90-day extension or accepting his discharge; (11) that Petitioner did not accept the 90-day extension; (12) that within hours, thereafter, Petitioner was separated from the United States Army on March 5, 1980 with an Honorable Discharge and an RE-1A reenlistment code; (13) that with a reenlistment code of RE-1A, Petitioner was prohibited from reenlisting for 93 days, and at the end of 93 days could only reenlist at the next lower pay grade, E-4; and (14) that Petitioner has protested the injustice of his involuntary resignation since he was discharged against his will on March 5, 1980.

In sum, had the Second Circuit Court of Appeals followed the broader "balancing of the equities" test applied by the Fourth Circuit, the District of Columbia Circuit, and the Federal Circuit Courts of Appeals and not simply accepted the government's "stated reasons" for the Petitioner's resignation, the result in the case would have been different.

The different standards applied among the circuits on the issue of how "involuntary or coerced resignations" are treated on motions for summary judgment is dramatically illustrated in the present case. Because Petitioner's case arose in the Second Circuit, he was subject to the Second Circuit's narrow "stated reason" approach in dealing with the issue of voluntariness instead of the broader "balancing of the equities" approach followed by the Federal, District of Columbia and Fourth Circuit Courts of Appeals.

For these reasons, Counsel for the Petitioner respectfully submits that a conflict in the circuits exists on the issue of what standard of review is to be applied in "involuntary or coerced resignation" cases arising on mo-

tions for summary judgment under Rule 56(c) and that the application of different tests by the circuit courts is an important reason for granting the petition for a writ of certiorari in the present case.

II. CONTRARY TO LAW

The second reason the Supreme Court of the United States should grant the petition for a writ of certiorari in the present case is because the decision of the Second Circuit Court of Appeals is contrary to law.

The Army has adopted an "up or out" program for military personnel and a soldier who fails to reach a certain pay grade within a prescribed number of years will not be retained on active duty and will be denied the opportunity to reenlist *unless* his commander grants him a waiver. Paragraph 2-25 of Army Regulation No. 601-280 provides that soldiers in the pay grade E-5, for example, who have more than 13 total years of active duty service, are ineligible for retention in the United States Army and are to be separated from active duty. Army Reg. No. 601-280, ch. 1, § VII, para. 2-25 at 2-9 (C5, 15 Sept. 1981).

Paragraph 2-26 of the same regulation gives commanders authority to grant waivers of this "ineligibility for retention" requirement (1) based on the member's demonstrated performance and review of the field DA Form 201 file (personnel records) and (2) provided the "individual is otherwise eligible for reenlistment without [the] waiver." Army Reg. No. 601-280, ch. 1, § VII, para. 2-26(b)(1) & (2) at 2-10 (C5, 15 Sept. 1981).

However, not every soldier who fails to reach a certain pay grade within a prescribed number of years is eligible to apply for a waiver from his commander. Paragraph 2-23 of Army Regulation No. 601-280 identifies certain types of individuals who are not eligible for immediate reenlistment and not authorized to submit requests for

waivers. Among those not authorized to submit requests for waivers are "conscientious objectors," "[p]ersons separated for physical disability", "personnel diagnosed as obese or overweight," [p]ersons being separated from current term of service with a bar to reenlistment," and "*[p]ersons being separated from current term of service whose DD Forms 214 are coded RE 1A . . . .*" *Id.* at 2-8 (emphasis added).

In the present case, Petitioner was ordered to report to the Oakland Army Base for separation from the United States Army with an Honorable Discharge and an RE 1A reenlistment code. As noted, an RE 1A reenlistment code means that the service member is "[f]ully qualified, but [is] ineligible to enlist within 93 days after the date of separation." Army Regulation No. 601-210, ch. 1, § III, para. 3-8, Table 3-6 at 21 (Update, 11 Sept. 1987).

On March 5, 1980, Petitioner was separated from the United States Army with an Honorable Discharge and an RE-1A reenlistment code. Because Petitioner received a reenlistment code of RE-1A, Petitioner had to wait at least 93 days before he could reenlist.

What is clear from the record is that when Petitioner's current term of service expired on November 4, 1979, he was an E-5 with more than 13 years of service. Since he was ineligible to serve on active duty as an E-5 with more than 13 years of service, he had to obtain a waiver from his commander if he wanted to stay on active duty. What is also clear from the record is that, because Petitioner was to be separated from the United States Army with an RE 1A reenlistment code, he was not eligible under Army Regulation 601-280 to request a waiver from his commander to stay on active duty. Because he was ineligible to request a waiver, there was no way as an E-5 that he could stay on active duty. And since he was not eligible to apply for a waiver, there also was no reason for him to accept the Army's offer of a 90-day exten-

sion to seek a waiver from the commander of the Oakland Army Base.

Despite these facts, the Second Circuit Court of Appeals ruled that:

> It is undisputed that [Petitioner] had an opportunity [at the Oakland Army Base] in 1980 to seek an extension of his Army service in order to apply for reenlistment and that he elected not to do so. Neither the Army nor the court was required to accept [Petitioner's] contention that his failure to follow that course of action should be ignored because of his view that it had little chance of success. The Army's finding that [Petitioner] had thereby waived his right to seek reenlistment was neither arbitrary nor capricious. The conclusion of the District Court that [Petitioner therefore] had waived his right is not erroneous.

App. at 4a-5a. In effect, the Second Circuit Court of Appeals ruled that Petition should have accepted the 90-day extension offered by the Army in order to request a waiver which under Army Regulations he was ineligible to apply for; and that because he failed to accept the extension and submit a request for a waiver that he was ineligible to receive, he waived his right to reenlist and thus voluntarily resigned from the Army.

Not only is this conclusion contrary to law set forth in paragraph 2-23 of the Army Regulation 601-280, but it is also arbitrary and capricious. In effect, the Second Circuit has ruled that Petitioner's resignation was voluntary, because he failed to apply for a waiver which under Army Regulations he was not eligible to receive. Unfortunately, the District Court,[8] the ABCMR,[9] and the

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[9] "THE COURT: He never applied for a waiver. He waived his right." App. at 10a.

[10] "2. Applicant is not entitled to be retroactively restored to active duty, having voluntarily terminated his military status and not having applied for reenlistment with a waiver." App. at 16a.

Office of the Judge Advocate General of the Army [10] all reached the same erroneous conclusion.

In short, Counsel for Petitioner contends that Petitioner waived no rights in failing to accept a 90-day extension offered to him by the Government. He waived no rights in failing to accept the 90-day exension because under Army Regulations he was not eligible to submit a request for a waiver. For this reason, Counsel for Petitioner submits that the Second Circuit's conclusion that Petitioner voluntarily resigned from the United States Army is contrary to law, and is arbitrary and capricious.

Counsel for the Petitioner further submits that because the Second Circuit's decision is contrary to law, Petitioner has been denied due process under the Fifth Amendment to the Constitution. Because of the fundamental nature of the legal error committed by the Second

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[11] 5. Our opinion that the applicant is not entitled as a matter of law to [restoration to active duty and correction of his records to reflect continuous active duty since his separation] is based on the applicant's voluntary termination of his military status in March, 1980. It is not clear from the materials in the file whether the applicant, in fact, submitted a request for waiver of his disqualifier for immediate reenlistment (excessive time in service for a soldier serving in the grade of E-5) and for reenlistment while still in Korea. . . . [E]ven if the Board determined that such in fact occurred, this issue is rendered moot, in terms of whether the applicant is entitled to relief as a matter of law, by the applicant's election to be discharged on 5 March 1980, after having been afforded the opportunity to request an extension sufficient to allow a request for reenlistment to be processed. . . . In other words, the demonstrated impact on the soldier of the reduction to E-5 was *not* a *per se* denial of continued service, but rather the imposition of an additional procedural step prior to a determination of whether such continued service would be permitted, a procedural step the applicant apparently has elected not to make.

App. at 21a.

Circuit in this case and the other reviewing authorities, Counsel for Petitioner respectfully requests that the Court GRANT the petition for a writ of certiorari in the present case.

III. PETITIONER HAS NO REMEDY AT LAW

The third reason the Supreme Court should grant the petition for a writ of certiorari in this case is because the decision of the Second Circuit Court of Appeals denies Petitioner an adequate remedy at law for the wrong that has been inflicted on him.

The general rule is that "[n]o one has a vested right in any given mode of procedure[,] . . . and [that] so long as a substantial and efficient remedy remains or is provided[,] due process of law is not denied." *Crane v. Hahlo*, 258 U.S. 142, 147 (1922). Due process thus does not require that a particular procedure be followed in providing an individual a remedy, but only that a substantial and efficient remedy be made available to those who have been wronged. In short, "'[w]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings,' the protections afforded by due process of law entitles the individual to a fair opportunity to show the governmental action was unwarranted." *Fitzgerald v. Hampton*, 467 F.2d 755, 763 (CADC 1972) citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

In the present case, the incorrect opinion from the Office of the Judge Advocate General of the Army and erroneous findings rendered by the ABCMR, the Federal District Court of the Eastern District of New York, and the Second Circuit Court of Appeals have served to deny Petitioner a substantial and efficient remedy for the wrong inflicted on him by the government. The Petitioner is pure as the "driven snow." For seven years he worked to establish his innocence and in the end he was successful. When he attempted to seek relief by asking

(1) to be reinstated on active duty in the United States Army at his former rank, (2) to be granted constructive credit for the time he lost, and (3) to be paid back pay for the income he was deprived of, the government denied his requests.

Petitioner submits that he was denied due process of law because the courts and the ABCMR concluded that his resignation from the United States Army on March 5, 1980 was voluntary. This erroneous conclusion deprived Petitioner of an opportunity to present evidence on his claims for constructive credit, back pay, and his right to be reinstated on active duty.

Specifically, Petitioner contends that the failure of the ABCMR and the courts to allow him to present evidence on these issues "denied him 'liberty' and 'property' without 'due process of law in contravention of the Fifth Amendment.'" *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Petitioner submits that the "property right" he was denied is his employment and that his "liberty' right is the "freedom to practice his chosen profession." *Id.*

While it is true that a soldier's expectations in continued employment are different than a civilian's expectation in continued employment, it does not follow that the armed forces have the right to terminate a soldier's career by unlawful or unjust means. Every soldier, sailor and airman understands that the "needs of the service" often dictate how decisions are made in the operation of the military system. For this reason, members of the armed forces do not expect the same level of job security or have the same employment expectations that individuals have in the civilian sector. But members of the armed forces should not be required to give up all of their rights to due process when they put on a uniform. *See Craword v. Cushman*, 531 F.2d 1114, 1125 (CA2 1976). Citizens of the United States serving in the armed forces should not have to endure or be subjected to unlawful or unjust treatment at the hands of their

military superiors just because they have elected to serve their nation in uniform and pursue a career in the military.

The Petitioner in the present case was the victim of a tragic injustice. Only through his perseverance and persistence has he been able to "right" the "wrong" done to him by the government. Because his right to relief matured after the statute of limitations had run in the Court of Claims, he is precluded by law from filing an action for relief in the Court of Claims. Because of the Courts' and the ABCMR's erroneous interpretation of Army Regulations, Petitioner similarly has been precluded from obtaining the relief he deserves through Army channels or in the federal court system. In sum, Petitioner is a man, who through his own efforts and in spite of the government's attempts to thwart him, has fought and achieved the "right" which is deservedly his. In the Supreme Court of the United States, Petitioner seeks the Court's assistance in obtaining a "remedy" for the wrong which was inflicted upon him in 1979.

The Second Circuit Court of Appeals and the other reviewing authorities have denied Petitioner relief because of their erroneous interpretation of the regulations governing the separation of a soldier from the United States Army. This failure on the part of the Courts to interpret the laws correctly has effectively denied Petitioner due process of law under the Fifth Amendment.

For these reasons, Counsel for Petitioner respectfully requests that the Supreme Court grant Petitioner's writ of certiorari.

CONCLUSION

Counsel for Petitioner respectfully requests that the Supreme Court of the United States grant the petition for a writ of certiorari in the present case (1) because the decision of the United States Court of Appeals for the Second Circuit is in conflict with decisions of the Courts of Appeals for the Federal Circuit, the District

of Columbia Circuit and the Fourth Circuit on the issue of how "involuntary or coerced resignations" are to be treated on motions for summary judgment; (2) because the decision of the United States Court of Appeals for the Second Circuit—that Petitioner waived his right to seek reenlistment and thus voluntarily resigned from the United States Army—is arbitrary, capricious and contrary to law; and (3) because the decision of the United States Court of Appeals for the Second Circuit violates Petitioner's right to due process of law under the Fifth Amendment because it denies Petitioner a remedy for the wrong that has been inflicted upon him.

Respectfully submitted,

JAN HORBALY
5310 Renaissance Court
Burke, Virginia 22015
(703) 978-7909
Counsel for Petitioner

Date: August 4, 1989

APPENDICES

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of March, one thousand nine hundred and eighty nine.

Docket Number 88-6165

MENDEL E. OFMAN,
Plaintiff-Appellant,

v.

THE UNITED STATES OF AMERICA, THE SECRETARY OF THE ARMY, THE HONORABLE JOHN O. MARSH, THE ARMY BOARD FOR THE CORRECTION OF MILITARY RECORDS,
Defendants-Appellees.

[Filed March 27, 1989]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant, MENDEL E. OFMAN, pro se.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

By: /s/ Fred M. Cassidy
FRED M. CASSIDY
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of January one thousand nine hunderd and eighty-nine.

Present:

HONORABLE AMALYA L. KEARSE,
HONORABLE RICHARD J. CARDAMONE,
HONORABLE RALPH K. WINTER, Circuit Judges,

No. 88-6165

MENDEL E. OFMAN,
Plaintiff-Appellant,
v.

THE UNITED STATES OF AMERICA, THE SECRETARY OF THE ARMY, THE HONORABLE JOHN O. MARSH, THE ARMY BOARD FOR THE CORRECTION OF MILITARY RECORDS,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of New York

[Filed January 6, 1989]

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Plaintiff Mendel E. Ofman appeals from a final judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, granting defendants' motion for summary judgment dismissing his complaint for reinstatement to active duty status in the United States Army as of 1980. On appeal, Ofman contends principally that the court erred in finding that his services would not currently be of use to the Army and in refusing to order elimination of the Army's own finding that in 1980 Ofman had waived his right to seek reenlistment. Finding no merit in any of his contentions, we affirm the judgment.

A member of the United States armed forces has no constitutionally protected property or liberty interest in continuing in military service. *Crawford v. Cushman*, 531 F.2d 1114, 1125 (2d Cir. 1976); *Schustack v. Herren*, 234 F.2d 134, 135 (2d Cir. 1956); *see Reaves v. Ainsworth*, 219 U.S. 296, 304 (1911); *Austin v. United States*, 206 Ct. Cl. 719, *cert. denied*, 423 U.S. 911 (1975). Accordingly, absent a statutorily created right to reenlistment, a court may have the power to order the Army to consider a claim of reenlistment *nunc pro tunc*, but it has no power to order the Army to grant reenlistment.

Ofman does not contend that he had a statutory right to reenlist, and we find no error in the district court's refusal to give him constructive credit for active service since 1980 or to order the Army to give further consideration to the matter of whether he should be reinstated. It is undisputed that Ofman had an opportunity in 1980 to seek an extension of his Army service in order

to apply for reenlistment and that he elected not to do so. Neither the Army nor the court was required to accept Ofman's contention that his failure to follow that course of action should be ignored because of his view that it had little chance of success. The Army's finding that Ofman had thereby waived his right to seek reenlistment was neither arbitrary nor capricious. The conclusion of the District Court that Ofman had waived his right is not erroneous. Given the lack of judicial power to order reinstatement here and the Army's premising of its action on Ofman's waiver, we regard the district court's comments on the present utility of Ofman's military skills as superfluous.

We have considered all of Ofman's challenges to the decision below and have found them to be without merit.

The judgment of the district court is affirmed.

/s/ Amalya L. Kearse
AMALYA L. KEARSE
U.S.C.J.

/s/ Richard J. Cardamone
RICHARD J. CARDAMONE
U.S.C.J.

/s/ Ralph K. Winter
RALPH K. WINTER
U.S.C.J.

Issued as Mandate: Jan. 30 1989

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-84-4156
(Weinstein, J.)

MENDEL E. OFMAN,

Plaintiff,

-against-

THE UNITED STATES, THE SECRETARY OF THE ARMY, THE HONORABLE JOHN O. MARSH, JR., and THE ARMY BOARD FOR CORRECTION OF MILITARY RECORDS,

Defendants.

Order of Judgment and Dismissal

This matter having come to be heard on May 10, 1988 on defendants' renewed motion for summary judgment, the parties having appeared and the Court having considered the submissions and arguments of counsel, for the reasons stated orally on the record, it is hereby:

ORDERED that defendants' renewed motion for summary judgment is granted in its entirety; and

IT IS FURTHER ORDERED that plaintiff's action is dismissed with prejudice.

Dated: Brooklyn, New York
May 16, 1988

/s/ Jack B. Weinstein
HONORABLE JACK B. WEINSTEIN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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84 4156 CV

MENDEL OFMAN,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendant.

United States Courthouse
Brooklyn, New York

May 10, 1988
9:30 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

HOWARD J. HERMAN, ESQ.
16 Court Street
Brooklyn, N.Y. 11201

For the Government:

ANDREW J. MALONEY
United States Attorney
By: SUZANNE SKINNER, ESQ.
Assistant United States Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

MAJOR PAUL CASCIO, ESQ.
Department of the Army

* * * *

[2] THE CLERK: Mendel Ofman against the Secretary of the Army.

MS. SKINNER: Susan Skinner for the United States, and with your Honor's permission, Major Paul Cascio will argue this for the United States.

MAJOR CASCIO: I will spell my last name C A S-C I O.

MR. HERMAN: Howard J. Herman, 16 Court Street for the plaintiff.

Good morning.

THE COURT: Good morning.

THE COURT: I will be happy to hear the argument.

MAJOR CASCIO: Your Honor, the Government believes that summary judgment should be entered on its behalf for three reasons in this case. This case has been around for some time, to briefly refresh your memory.

THE COURT: I remember the case and I have read all the records, but don't let me inhibit your argument.

MAJOR CASCIO: I will move right to the points I wish to express.

There are three reasons that we believe the government is entitled to summary judgment, the first being that plaintiff has failed to establish any basis for this Court's subject matter jurisdiction.

Secondly, he is not entitled to any relief in this [3] case.

Thirdly, the case having gone to the Army Board of correction of military records, and that body decided the issue that was presented to it, plaintiff has not demonstrated that it is arbitary or capricious or contrary to law.

THE COURT: The one point that did trouble me in going through the papers is that he was reduced in rank and then his enlistment expired. Shouldn't he be compensated for the difference in pay and allowances that he would have received during that period when his rank was improperly reduced?

MAJOR CASCIO: Yes, your Honor. In fact, an over —let me restate that for the record.

The Army Board for Correction of Military Records, if it is all right with the Court will be abreviated as ABCMR, to save the reporter a moment of time in typing. The ABCMR ultimately decided that Mr. Ofman was entitled to have the rank restored from the date that the punishment was imposed under Article 15 of the Uniform Code of Military Justice, and the date that he was released from active duty.

I would add at this point that the second date when he was released from active duty actually occurred after the date that his enlistment would have otherwise expired. I believe we stated in our earlier pleadings that he was held [4] beyond that expiration date initially because the government felt that they might have wanted to court marshal him.

THE COURT: All right.

MAJOR CASCIO: So the ABCMR in fact made that part of the correction. That directive, if you will, was in fact transmitted to the Army Finance Center and there is a procedure pursuant to Title 18 of Section 1552 when a correction has been made pursuant to the ABCMR action that the monetary corrective action would flow therefrom.

THE COURT: So he has to just apply and he will get paid?

MAJOR CASCIO: It is my understanding and my brother counsel can correct me if I am wrong, that in fact the Finance Center did send this claim statement to Mr. Ofman and it was not considered satisfactory.

THE COURT: I see. As as long as he would be paid for that time, that's satisfactory.

MR. HERMAN: Your Honor, it seems to me that the first thing I would like to say at the outset is that this is actually a duplication of a motion in large measure which the Court has already heard.

There was an initial motion for summary judgment pursuant to Rule 56 made by the U.S. Attorney's Office. Kevin Simmons was then counsel.

The Court had ruled on the motion and it was my [5] understanding that the Court had found jurisdiction, had retained jurisdiction, had directed that administrative remedies be exhausted and it was done in favor of the plaintiff.

THE COURT: The problem was that he refused at that time to take the lie detector test, and I wanted to give him an opportunity to straighten himself out. I gave him the opportunity. He took the detector test and he got remedy from the government as a result.

The question is what should I do with the case now? I don't see what else I can do for him.

MR. HERMAN: Your Honor is alleging that the damages that would flow is the fact that he was deprived of reenlistment.

THE COURT: He never applied for a waiver. He waived his right.

MR. HERMAN: In fact, in his affidavit he indicates he did apply for a waiver and we attached a memo for recording by Sergeant Harris who is the re-enlistment officer in Korea who stated in the memo for recording that it was in fact in active part of Captain Coleman (ph), the second in command to Colonel Turner who was the officer who imposed the improper Article 15 proceeding which resulted in his termination from the service, he was basically told to file my client's reenlistment application in the round file.

[6] THE COURT: I will not do anything to require the government to take him back. It is nine years after the event and clearly the government would have no use for him. At this point his skills, if he ever had any, have deteriorated and the whole nature of the Army has changed, so he is not going to get what he has asked for which is an order to reinstate him.

Given the fact that he is not going to be reinstated, back pay in the amount that you require would not be something I would give in any event as a District Court. You can get that from the Court of Claims, if you have

any claim for it. I don't believe you have any valid claim for it. It is well over $10,000. There is no relief I can give you here and I don't think he is entitled to any relief.

A good deal of the delay as I recall the case was due to his own foot dragging.

MR. HERMAN: In fact, your Honor, that's not the case. A great deal of the delay was occasioned by the U.S. Attorney's office in the turn-over of four assistants in the case.

THE COURT: You may be right. But there is nothing I can do for him now. He has the normal relief he can get.

MR. HERMAN: Your Honor, there was a constitutional question raised in terms of the deprivation of his rights in terms of the institution of the Article 15.

[7] THE COURT: That's corrected now. He has gotten his right back. He has gotten everything they can give him. He has served during the period. He has gotten an honorable discharge. His rank has been increased and he will be paid for the time he served.

I can't tell the government to take an old soldier back.

MR. HERMAN: The other alternative relief which was requested was the differential between his civilian pay and what he would have received including cost of living adjustments and so on.

THE COURT: It is all too hypothetical, I can't possibly give him any of this.

If there has been any injustice here, it is due to the natural delay of the wheels of justice. They turn very slowly. But my recollection is that a large part of it was due to the refusal of your client to take a lie detector test or do whatever else they wanted him to do.

Whether it was or not, I can't give you any further relief.

Motion to dismiss granted. Take an appeal. If they say I can do more for you I will be glad to consider it.

But I don't think there is any merit at this point. You may have a Court of claim action.

MR. HERMAN: Thank you, your Honor.

[8] THE COURT: Dismissed.

Submit a judgment.

APPENDIX E

DEPARTMENT OF THE ARMY

[SEAL]

[Heading Illegible]

PROCEEDINGS

IN THE CASE OF: OFMAN, MENDEL E.
092-36-0110

BOARD DATE: 8 January 1986

DOCKET NUMBER: AC81-11921A

INDEX NUMBER: 126.00

I certify that hereinafter is recorded the true and complete record of the proceedings of the Army Board for Corrections of Military Records in the case of the above-named individual. The following members, a quorum, were present.

Mr. Dominic R. Ciccotelli	Chairman
Mr. Charles V. Szenas	Member
Mr. Charles H. Loundermon	Member
Mr. Karl Eielenberg	Executive Secretary
Mr. Wallace C. Taliaferro	Examiner

The applicant did not appear before the Board and was represented by counsel who did not appear before the Board.

The applicant requests correction of military records as stated in the applicaton to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A—Application for correction of military records

Exhibit B—Military Personnel Records

FINDINGS:

1. The applicant has exhausted all administrative remedies afforded by existing law or regulations.

2. Applicant requests reconsideration of his original application in which he sought to have nonjudicial punishment set aside and all rights, privileges and property restored; to be restored to his former grade; and to be allowed to reenlist with full credit for the time he was out of the service.

3. Applicant contends he was not guilty of the misconduct for which he was punished.

4. On 19 June 1979, while serving on active duty in grade E6, applicant was punished nonjudicially for alleged black market activities. His punishment included reduction to E5 and forfeiture of $150.00. He appealed. A judge advocate review held that the proceedings were conducted in accordance with law and regulations and the punishments were not unjust nor disproportionate to the offense, and the appeal was denied.

5. On 5 March 1980, applicant was honorably discharged, by reason of completion of required service, and credited with 13 years, 3 months, 13 days active service. He was assigned reelistment eligibility code RE-1A, indicating he was fully qualified for reenlistment but ineligible to reenlist within 93 days from his discharge.

6. Applicant's original application was considered by this Board, in a formal hearing, on 3 November 1982, and was denied. In an action in the United States District Court for the Eastern District of New York, the court recessed to allow applicant to exhaust his administrative remedy with this Board. Applicant having submitted newly discovered evidence, not previously considered by the Board, and an recommendation to, and approval by, the Secretary of the Army, this case is before the Board for reconsideration.

7. On 25 July 1985, at the Criminal Investigation Command, pursuant to authority granted by the then Executive Secretary, applicant underwent a polygraph examination. He persisted in his denial of any involvement with the black market incident which had resulted in his nonjudicial punishment. The examiner, a person of extensive experience, now occupies the position of Director, U.S. Army Crime Records Center, concluded that applicant was not involved in the alleged black market activities.

8. On 8 November 1988, in an advisory opinion from the Office of the Judge Advocate General (OTJAG), the Board was advised that applicant has presented evidence sufficient to demonstrate the existence of material injustice; and that, if the Board determines that a correction of records is required, the following actions would be appropriate:

a. removal of the record of punishment (DA Form 2627), and all references thereto in other documents, from applicant's official records;

b. restoration of all rights, privileges and property affected by the nonjudicial punishment, including restoration to grade E6; and

c. consideration by enlisted standby advisory board for promotion to E7, if applicant would have, but for the reduction in grade, been in a zone consideration between the date of punishment and the date of his discharge.

The OTJAG opinion further concluded that applicant is not entitled, as a matter of law, to retroactive restoration to active duty, since he voluntarily terminated his military status in March 1980 by not extending his enlistment to seek a waiver, since it does not appear, from the file, that he requested a waiver of his disqualification, and since immediately thereafter, he had been eligible for reenlistment with a waiver, but has not applied.

CONCLUSIONS:

1. In retrospect, and based on newly presented evidence, not previously available to the Board, it appears that the imposition of punishment on 19 June 1979 was unjust.

2. Applicant is not entitled to be retroactively restored to active duty, having voluntarily terminated his military status and not having applied for reenlistment with a waiver.

3. The DA Form 2627, and all references thereto in other documents, should be removed from his records, the punishment should be set aside, all rights, privileges and property affected thereby should be restored, and if applicant would have been in a zone of consideration for promotion to E7, but for the reduction in grade, he should be considered by an enlisted standby advisory Board.

RECOMMENDATION:

1. that all of the Department of the Army records of MENDEL E. OFMAN be corrected by removing therefrom the DA Form 2627, relating to punishment imposed on 19 June 1979, and all references thereto in other documents, from his Official Military Personnel File.

2. That the punishment, consisting of reduction to E5 and forfeiture of $150.00, be set aside and all rights, privileges and property of which he was deprived as a result of said punishment be restored, including reimbursement of forfeiture and restoration to grade E6 with his original date of rank.

3. That, following administrative implementation of the foregoing, the records of MENDEL E. OFMAN be submitted, if appropriate, to duly constituted Standby Advisory Boards for promotion consideration to the grade of E7; that in the event he is so eligible, and is selected for promotion, this case be returned to this Board for the implementation of such promotion.

4. That so much of his application as is in excess of the foregoing be denied.

BOARD VOTE:

Initials	Initials	Initials	
			GRANT AS STATED IN RECOMMENDATION
			GRAND FORMAL HEARING
			DENY APPLICATION

SIGNED
CHAIRMAN

APPENDIX F

DISPOSITION FORM

Reference or Office Symbol EAMC-MD.

Subject Memorandum For Record

Date 20 Feb. 80

From Leonard J. Harris

REUP NCO
121st Evac Hosp
APO 96301

On 26 Feb. 80 I asked CPT Coleman, what he was going to do about Specialist Five Ofman['s] reenlistment application. He stated we were going to sit on it until Ofman, PCSed. After this I made no further attempt to get it signed.

/s/ Leonard J. Harris
LEONARD J. HARRIS
121st Evac Hosp
APO 96301

APPENDIX G

DAJA-AL 1985/2937 (13 August 1985)

SUBJECT: Correction of Military Records—
OFMAN, Mendel E.

To ABCMR, CSA

From DAJA-ALP

Date 8 Nov. 1985

CMT 3
CPT Buchholz/r/44586

1. The application and military records of Mendel E. Ofman have been reviewed by this office per your request. Our comments are provided below. We have noted the opinion of the Criminal Law Division, OTJAG, in CMT 2.

2. It appears that the central issue in applicant's case is the validity of the nonjudicial punishment in June, 1979, which is a matter for resolution by the Board in the exercise of its fact-finding power. As provided in paragraph 10b, AR 15-185, it is the applicant's burden to present sufficient relevant evidence to demonstrate the existence of probable material error or injustice. In that regard, the Board may make *de novo* findings of fact concerning the truthfulness of the applicant's denial of guilt and the statements of Spencer, the witness. Although findings favorable to the applicant on those issues would not be tantamount to a conclusion that the Article 15 was legally insufficient when imposed, it is the opinion of this office that, under those circumstances, and especially in light of previous action by the ABCMR in this case, the applicant will have met his burden of demonstrating an injustice warranting relief.

3. Should the Board determine that correction of the applicant's records is required, it is our opinion that the following actions would be appropriate:

a. Removal of the Article 15 (DA Form 2627) from all official records;

b. Removal of any reference to the Article 15 from official records (including, for example, any references to the Article 15 in evaluation reports);

c. Correction of applicant's records to reflect restoration of any rights, privileges, or property affected by the Article 15;

d. If the applicant would have been in a zone of consideration for promotion to SFC (but for the reduction in grade) between the date of imposition of punishment and separation from the service, consideration of his records by the Enlisted Standby Advisory Board, pursuant to paragraph 7-44, AR 600-200.

4. Concerning the applicant's request for restoration to active duty and correction of his records to reflect continuous active duty since his separation, it is our opinion that the applicant is not entitled, as a matter of law, to such relief. The board may, however, should it be determined to be necessary to correct an injustice, amend the applicant's records to reflect continuous active duty through the day prior to action by the Board. Further, if the Board grants such relief, it would be appropriate for the applicant's records to be considered by the Enlisted Standby Advisory Board if the applicant would have been in a zone of consideration for promotion during such period of time. Subsequent to Board action outlined above, it would be the applicant's responsibility to voluntarily submit to military authority by reenlisting in the Regular Army.

5. Our opinion that the applicant is not entitled as a matter of law to relief beyond that outlined in paragraph 3 above is based on the applicant's voluntary termination of his military status in March, 1980. It is not clear from the materials in the file whether the applicant, in fact, submitted a request for waiver of his disqualifier

for immediate reenlistment (excessive time in service for a soldier serving in the grade of E-5) and for reenlistment while still in Korea. It has been alleged that such requests were submitted but that the applicant's chain of command did not process them. However, even if the Board determined that such in fact occurred, this issue is rendered moot, in terms of whether the applicant is entitled to relief as a matter of law, by the applicant's election to be discharged on 5 March 1980, after having been afforded the opportunity to request an extension sufficient to allow a request for reenlistment to be processed. Moreover, from a preliminary review of applicant's situation and the applicable regulations, it appears that the applicant was, immediately subsequent to his discharge, and, continuously since his discharge, has been eligible to reenlist in the Regular Army with a waiver (see Rule H, Table 3-1, AR 601-210). However, there is no indication in the file that the applicant has ever attempted to reenlist in the Regular Army since his separation. The applicant has submitted no evidence that, had he requested reenlistment with a waiver in March 1980 or subsequently, his request would have been disapproved. In other words, the demonstrated impact on the soldier of the reduction to E-5 was *not* a *per se* denial of continued service, but rather the imposition of an additional procedural step prior to a determination of whether such continued service would be permitted, a procedural step the applicant apparently has elected not to make. On the other hand, we note that but for the applicant's reduction to E-5, it appears that he would have been eligible for immediate reenlistment in the Regular Army, without a waiver, in March, 1980. In any event, a careful balancing of the equities in this case should be made prior to a determination of whether correction of the applicant's records to reflect service on active duty beyond 5 March, 1980 is required to correct an injustice. It should also be noted that if it is determined that the applicant is entitled to payment of pay and allowances for such a

period of time, paragraph 25, AR 15-185 requires that such amount be offset by earnings received from civilian employment.

FOR THE JUDGE ADVOCATE GENERAL:

/s/ Ronald J. Buchholz
RONALD J. BUCHHOLZ
CPT, JAGC
Military Personnel Law Branch
Administrative Law Division

APPENDIX H

Record of Proceedings Under Article 15, 10 U.S.C. § 815 (1982) (June 19, 1979) lodged with the Clerk of Court.